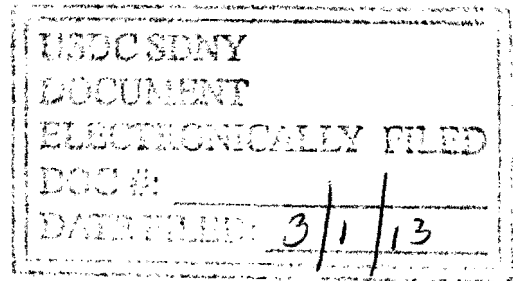


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
KEVIN CHEEK,

Petitioner,

:  
: REPORT & RECOMMENDATION

-against-

:  
: 98 Civ. 4568 (LAP))MHD)

:  
CHRISTOPHER ARTUZ, Superintendent,  
Green Haven Correctional Facility, :

Respondent.  
-----X

TO THE HONORABLE LORETTA A. PRESKA, U.S.D.J.:

In 1998 Christopher Cheek filed a pro se petition in this court seeking to challenge his 1993 conviction in the New York State Supreme Court on charges of Robbery in the Second Degree and Sexual Assault in the First Degree. By order dated March 28, 2000 the District Court denied the petition as untimely under 28 U.S.C. § 2244(d)(1). (See Report & Recommendation dated Feb. 28, 2000; Memorandum Opinion & Order dated March 28, 2000).

From the Bermuda Triangle of our filing cabinets, we have unearthed the facts that in November 2004 plaintiff sent a letter to the court asking to renew his habeas proceeding on the basis of what he termed newly discovered evidence -- specifically, the release to him on a FOIL request of a police voucher recording the return of certain property to the robbery victim -- and that

respondent submitted an opposing affidavit dated February 1, 2005. Notwithstanding the egregious and embarrassing delay on our part in addressing this matter, we are constrained to conclude that this court lacks jurisdiction to address petitioner's application, which, we note, rests on petitioner having received a copy of the voucher in question in 1999.<sup>1</sup>

Under 28 U.S.C. § 2244(b)(3)(A), an application to file a second or successive petition must be made in the Court of Appeals. "A petition is second or successive if a prior petition 'raising claims regarding the same conviction or sentence [] has been decided on the merits.'" Quezada v. Smith, 624 F.3d 514, 517-18 (2d Cir. 2010) (quoting Corrao v. United States, 152 F.3d 188, 191 (2d Cir, 1998)).

In this instance, as noted, Cheek's original petition was dismissed as untimely, and that disposition is deemed a decision "on the merits" and hence bars the unauthorized filing of another petition addressed to the same conviction. See, e.g., Quezada, 624 F.3d at 517-20. Accordingly, under the terms of 28 U.S.C. §

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<sup>1</sup>It bears mention that the return of the stolen property to the victim was known to the petitioner at the time of the trial (see Tr. 185-86), and indeed was the subject of petitioner's coram nobis application in 1997.


2244(b), the application for leave to file must be denied in this forum.

#### CONCLUSION

For the reasons stated, petitioner's letter application to file a second petition should be denied without prejudice to the filing of a motion for such leave in the Second Circuit.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of the Honorable Loretta A. Preska, Room 2220, and to the undersigned, Room 1670, 500 Pearl Street, New York, New York, 10007-1312. Failure to file timely objections may constitute a waiver of those objections, both in the District Court and on later appeal to the United States Court of Appeals. See 28 U.S.C. § 636 (b)(1); Fed. R. Civ. Pro. 72, 6(a), 6(e); Thomas v. Arn, 474 U.S. 140 (1985); DeLeon v. Strack, 234 F.3d 84, 86 (2d. Cir. 2000) (citing Small v. Sec'y. of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)).

Dated: New York, New York  
March 1, 2013



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MICHAEL H. DOLINGER  
UNITED STATES MAGISTRATE JUDGE

Copies of this Report & Recommendation are being sent today to:

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